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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO LUTHER REYNOLDS, Defendant and Appellant.	B203037 (Los Angeles County Super. Ct. No. BA285537)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charlaine S. Olmedo, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Antonio Luther Reynolds (defendant) appeals from the judgment entered following his plea of no contest to oral copulation with a child under 14 years of age and 10 years younger than defendant (Pen. Code, § 288a, subd. (c)(1)),[1] with his admission that he had a prior conviction of a serious or violent felony within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i); 1170.12). The trial court sentenced him to a 12-year prison term, which consisted of a doubled, middle term of six years.

Defendant contends that the trial court improperly denied his *Marsden* motion. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).)

We affirm the judgment.

FACTS

1. Defendant's Plea of No Contest

The amended information charged defendant with four counts of committing lewd acts on a child under the age of 14 years (§ 288, subd. (a)), with committing lewd acts on a child who was 15 years old when defendant was at least 10 years older than the child (§ 288, subd. (c)(1)), with pandering by encouraging (§ 266i, subd. (a)(2)), and with unlawful sexual intercourse with a child under the age of 16 when the defendant was over the age of 21 (§ 261.5, subd. (d)). The information also alleged that defendant had one prior conviction of a serious felony (§ 667, subd. (a)), two convictions of a serious or violent felony qualifying him for sentencing pursuant to the Three Strikes law, and three prior felony convictions for which he had served a prison term (§ 667.5, subd. (b)).

On January 30, 2007, during jury voir dire, defendant accepted a plea bargain negotiated by his trial counsel. The People agreed to add a count 8 to the information, oral copulation with a child under 14 years of age and 10 years younger than defendant. Defendant pled no contest to the new count 8 and admitted one prior conviction requiring sentencing pursuant to the Three Strikes law. After defendant entered his plea and

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

admission, the trial court sentenced him, as promised, to an aggregate 12-year prison term. All other counts and allegations of enhancements were dismissed.

2. The Factual Basis for the Plea

The evidence adduced at the preliminary hearing established that the victim, A.C., was born in late 1988.[2] At one time, A.C.'s sister, D., had been married to defendant. A.C. met defendant once at a motel when she was 12. There she had sexual intercourse and engaged in oral copulation with him. At that time, defendant was aware that A.C. was only 12 years old. He was 26 years older than A.C.

A.C. was ordered into placement because she was engaging in prostitution. In August 2004, A.C., age 15, was released from juvenile placement. She agreed to be defendant's girlfriend, and they had a sexual relationship. She also reluctantly agreed to be a prostitute and to turn over all of her illicit earnings to defendant.

In October 2004, she tired of the arrangement with defendant and her family discovered what she was doing. She reported defendant's sexual misconduct to the police. A.C. told the officer that she had had sexual relations with defendant as recently as October 24, 2004. Also, she said that when she had told defendant that she would no longer work for him, he had threatened to kill her. She was afraid of defendant.

The probation report discloses that after defendant's arrest and a *Miranda* warning (*Miranda v. Arizona* (1966) 384 U.S. 436), he admitted the sexual misconduct. He also admitted other sexual misconduct with A.C. and two of A.C.'s sisters when the sisters were also minors.

3. The *Marsden* Motion

On March 8, 2006, following a *Marsden* motion, appointed counsel Robert Horner (Horner) was substituted out in favor of another appointed attorney, Jimmie Johnson (trial counsel).

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[2] Trial counsel made a section 995 motion in the case.

Thereafter, on September 15, 2006, January 18, 2007, and January 27, 2007, three different judges heard defendant's requests to replace trial counsel. These *Marsden* motions were denied. On appeal, defendant challenges only the latter motion, which was denied on January 27, 2007, and which was made as the trial court commenced voir dire.

Once the courtroom had been cleared, defendant claimed that he was not being properly represented. Defendant said that he and trial counsel "argue[d] too much." There had been a confrontation during every jail visit. On the previous Friday, trial counsel had told defendant that trial counsel did not like defendant and would not file the motions defendant had personally prepared. Trial counsel told defendant that he was "not [defendant's] secretary and . . . he's not [defendant's] b----."

Urging there was a "conflict," defendant said that he did not want trial counsel representing him, and he had never wanted trial counsel to represent him. Trial counsel "never did nothing for" him, trial counsel had refused to give him his transcripts, and trial counsel would not file his motions "to save [his] life on these allegations that are lies."

Defendant claimed: "He ain't in my best interest, period. Never has been since day one." Defendant complained that he had informed trial counsel that A.C. would not be testifying because her testimony was "a lie." Also, trial counsel had obtained his agreement to a postponement of trial for 30 days, but counsel then postponed the trial for a longer period of time. Trial counsel had sent the defense investigator to the jail to request a time waiver. He asked the trial court, "Why would [trial counsel answer ready in another case] knowing that [defendant's trial was scheduled to begin] on July 20, 2006? So he's not [acting] in my best interest."

Defendant said that trial counsel was working with the deputy district attorney to find A.C. and that A.C. did not want to come to court. He asserted that "[t]hey" were "saying" that they would use a two-year-old transcript against him at trial. Defendant insisted that such a procedure was unauthorized. He was sure that there was a law somewhere in a book preventing such a procedure, and his trial counsel had refused to provide him with that authority.

The trial court inquired how long Johnson had been representing defendant. Trial counsel replied, "I am the fourth lawyer to represent [defendant], and I think he has had problems with every one of them." Trial counsel said that he knew the previous counsel, Horner. Trial counsel believed that Horner had been glad to be relieved as counsel of record. Trial counsel said that he was doing everything that he could possibly do for defendant. However, defendant was the type of person who only wanted to hear that his case would have to be dismissed. He had repeatedly attempted to impress on defendant that the evidence in his case was strong and that a conviction was likely. When counsel attempted to have defendant confront the reality of his situation, defendant accused him of working on behalf of the prosecution.

Trial counsel acknowledged that his relationship with defendant involved "a lot of friction" and "tension." He said that defendant was difficult, "stubborn[,] and arrogant." Trial counsel had also told defendant privately that he was difficult. Trial counsel informed the trial court that there had been two preliminary hearings in the case. During the initial preliminary hearing, A.C. testified. Later, she was not available for trial, and the People dismissed and refiled defendant's case. Defendant had told trial counsel repeatedly that A.C. would not be appearing as a witness. However, A.C. had subsequently appeared in court and had been ordered to appear at a later trial date. Trial counsel had explained to defendant that such a scenario entitled the People to use A.C.'s preliminary hearing testimony to prove guilt. Trial counsel had an ongoing dispute with defendant over the issue, and defendant was convinced that if A.C. failed to appear for his trial, the case would be dismissed.

Evidently, two different bench officers had informed defendant that this belief was erroneous, but defendant had remained certain that the law supported his position. Trial counsel had attempted to get defendant to be realistic, but defendant refused to believe him, and defendant was facing a life term in the case. Given defendant's age, even if he was committed as a second-strike offender, 85 percent of a maximum 39-year term was the equivalent of a life term.

Trial counsel said that defendant's intransigence resulted in a lot of arguing, and during their discussions, he had told defendant that he did not like him. Also, trial counsel had informed defendant that his conduct in the courtroom had already alienated two of the bench officers before whom they had appeared. Trial counsel had tried to explain to defendant that he was not helping himself with this behavior. However, he had also told defendant that defending people with personality issues was part of his job. He was a professional and would do his best for defendant, regardless of defendant's likeability.

Trial counsel refused on two occasions to file motions requested by defendant and explained to defendant their respective roles in the proceedings. Trial counsel also told defendant that he would consider whatever defendant wanted to do, and the claim that he had called defendant a "b----" was a fabrication. There was nothing more trial counsel could do to prepare the defense: he had filed the appropriate motions, and he had investigated the case. He had been a practicing attorney since 1988 and was a "grade 4 [bar] attorney." He had represented murderers, as well as a number of defendants charged with sex crimes who eventually plead guilty.

The trial court enumerated for defendant the many motions trial counsel had filed on his behalf. The trial court inquired whether defendant had anything further to add to his complaints.

Defendant replied that he did not want trial counsel representing him -- "period." He did not care about the motions trial counsel had filed. He wanted his own motions filed. He claimed that trial counsel had refused to obtain certain witnesses on his behalf. Defendant wanted his wife to testify that they had been unable to check into the motel in question without two pieces of identification. Trial counsel, however, had informed him that his wife had not given the investigator "the address." The investigator later contradicted trial counsel's claim.

Trial counsel told the court that defendant had wanted his wife to testify at trial to the motel's policy of requiring identification before it would rent a room. Trial counsel

had explained to defendant that his wife's testimony was inadmissible on the point. He had attempted to obtain testimony from the manager or the owner of the hotel to make this point, but was unable to locate anyone who had worked at the motel during the relevant period of time due to several changes in ownership. Trial counsel had tried to obtain motel records and could not secure them. Even the police had unsuccessfully attempted to get these records. Again, defendant had this "notion" that such evidence would exonerate him, and defendant would not accept trial counsel's explanation that such evidence was unavailable.

After listening to all of defendant's complaints, the trial court denied the *Marsden* motion.

Trial counsel added that had they not been so close to trial, he would gladly ask to be relieved. However, he observed that any attorney the trial court appointed would suffer the same difficulties with defendant.

The trial court concluded: "I find that any deterioration in the relationship has been by the defendant's recalcitrant and defiant attitude, and there is no reason why in the future, [defendant] cannot be adequately represented by [trial counsel]." The trial court observed that they had commenced trial and that trial counsel was ready to proceed with the trial. Any conflict between defendant and trial counsel was not "of such a nature that [trial counsel could] not continue to represent [defendant] at this stage" of the proceedings.

DISCUSSION

Defendant contends that the trial court abused its discretion and denied him his constitutional rights to the effective assistance of counsel when it refused to discharge trial counsel and to appoint new counsel on the first day of trial.

We disagree.

I. The Relevant Legal Principles

"Under the Sixth Amendment right to assistance of counsel '"'[a] defendant is entitled to [the substitution of new appointed counsel where] the record clearly shows

that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'"' (*People v. Memro* (1995) 11 Cal.4th 786, 857.) Furthermore, '"'[w]hen a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance.'"' [(*People v. Roldan* (2005) 35 Cal.4th 646, 681 (*Roldan*).)] 'We review the court's rulings for an abuse of discretion.' (*Ibid.*)" (*People v. Welch* (1999) 20 Cal.4th 701, 728-729.)

"The court does not abuse its discretion in denying the motion [to substitute counsel] unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 604 (*Smith*); accord, *Roldan, supra*, 35 Cal.4th at p. 681; see also *People v. Burton* (1989) 48 Cal.3d 843, 855.)

"'By choosing professional representation, the accused surrenders all but a handful of "fundamental" personal rights to *counsel's* complete control of defense strategies and tactics.' [Citations.]" (*In re Horton* (1991) 54 Cal.3d 82, 95.) "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) Tactical disagreements between the defendant and his attorney do not by themselves constitute an '*irreconcilable* conflict.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' (*People v. Carpenter* (1997) 15 Cal.4th 312, 376.)" (*People v. Welch, supra,* 20 Cal.4th at pp. 728-729.)

"A defendant may not effectively veto an appointment of counsel by claiming a lack of trust in, or inability to get along with, the appointed attorney. [Citation.] Moreover, the trial court need not conclude that an *irreconcilable* conflict exists if the defendant has not tried to work out any disagreements with counsel and has not given

counsel a fair opportunity to demonstrate trustworthiness. [Citation.] . . . '[A] defendant may not force the substitution of counsel by his own conduct that manufactures a conflict.' [Citation.]" (*Smith, supra*, 30 Cal.4th at p. 606; accord, *People v. Abilez* (2007) 41 Cal.4th 472, 489 (*Abilez*).)

In ruling on a *Marsden* motion, the trial court may consider the following factors set out in the Ninth Circuit decisions, which are "'consistent with California law'": "'"'(1) [the] timeliness of the motion; (2) [the] adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense.'" [Citations.]'" (*Abilez, supra*, 41 Cal.4th at pp. 490-491.)

II. The Analysis

Defendant argues there was a breakdown in the attorney-client relationship and that "the conflict between [defendant] and trial counsel was so serious that communication between them had become so poisoned [that defendant] was effectively denied his right to counsel" under the California and federal Constitutions. He cites the decision in *U.S. v. Walker* (9th Cir. 1990) 915 F.2d 480, 484 (*Walker*), overruled on other grounds in *U.S. v. Nordby* (9th Cir. 2000) 225 F.3d 1053, 1059, as support for this claim. He asserts that the record also fails to support the trial court's conclusion that "'any deterioration in [defendant's] relationship with counsel was caused by [defendant's] alleged 'recalcitrant and defiant attitude.'"

Here, defendant's complaints were partially repetitive of his complaints on January 18, 2007, before Judge Champagne, and untimely as this motion was made right as trial commenced. The trial court gave defendant an adequate opportunity to set out any complaints that he had about trial counsel and listened carefully to each complaint, asking probing questions and then obtaining a response as to each complaint from trial counsel.

The record shows that the friction in the relationship arose because defendant wanted more control over the day-to-day trial strategy and the investigator in his case,

when the authorities required that only trial counsel enjoys such control. (See *People v. Hinton* (2006) 37 Cal.4th 839, 873-874 [defendant has the last word only as to a handful of personal fundamental personal rights, such as whether to plead guilty, whether to waive a jury trial and the right to counsel, and whether to waive the privilege against self-incrimination]; *People v. Clark* (1992) 3 Cal.4th 41, 118 (*Clark*) [the same].) Also, it was apparent that defendant had his own personal issues that interfered with his ability to assess reality. He refused to come to grips with the results of his Three Strikes status and the probability that the prosecution would prove its case. His inability to confront his situation resulted in a distrust of trial counsel and trial counsel's advice. Defendant's posture at the hearings demonstrates that defendant was very strong-willed, and that he even doubted the trial court's veracity when it supported trial counsel's conclusions as to the state of the law.

The record supports the trial court's conclusion that any conflict with trial counsel was of defendant's own making and defendant's right to counsel pursuant to the Sixth Amendment was not compromised. (*Clark, supra*, 3 Cal.4th at p. 118 [defendant refused to accept there were matters within the province of trial counsel to decide, and he wanted to make his trial counsel subservient to his whims; any lack of communication was attributable to defendant himself].)

The decision in *Walker, supra*, 915 F.2d at pages 483-484, does not persuade this court of an irreconcilable conflict of interest. In *Walker*, trial counsel advised the trial court that defendant was preventing him from preparing for trial and there was vital information that he needed from the defendant. The defendant had refused to speak to his trial counsel or to assist preparation of the case because he wanted new counsel. (*Id*. at p. 484.) The trial court ruled that in the circumstances, there was no reason trial counsel could not adequately represent the defendant. Trial counsel argued to the trial court that a complete refusal to confer amounted to an "irreconcilable difference that [prevented him from representing the defendant] at this time." (*Ibid*.) Despite trial counsel's protests, the trial court failed to act on trial counsel's complaint. (*Ibid*.)

On appeal, the reviewing court in *Walker* found fault with the trial court's myopic focus only on the competence of trial counsel. It concluded that the trial court had failed to make an adequate inquiry of the defendant and his trial counsel to discover the nature of the conflict and whether there was a breakdown in communication between the defendant and his counsel. The record disclosed that the "conflict between [the defendant] and his counsel was so great that it resulted in a total lack of communication preventing an adequate defense." (*Walker*, *supra*, 915 F.2d at p. 483.) The court said that defendant's dispute with his trial counsel was not based on frivolous or manipulative grounds, but on a legitimate lack of confidence arising out of a disagreement over trial preparation and potential witnesses. As a result, defendant did not testify on his own behalf during his trial. (*Id*. at p. 484.) Without defendant's testimony, he was deprived of an attack on a key aspect of the prosecution's case. (*Ibid*.) The *Walker* court concluded that an irreconcilable conflict had arisen between the defendant and his trial counsel that had affected Walker's presentation of his defense.

The instant case is readily distinguishable. This trial court made a probing inquiry of defendant and his trial counsel prior to denying the motion for a substitution of counsel. There is no evidence in the record of a complete breakdown in communication. Once defendant ascertained that the prosecution could proceed to trial, he decided to accept the favorable offer of a plea bargain. He discussed the plea bargain with trial counsel and thereafter cooperated with trial counsel during the plea. The trial court was entitled to conclude that trial counsel's discussion with defendant over his likeableness was not such a blow to defendant that it affected defendant's ability to work with trial counsel. There is no evidence here that defendant pled guilty for any other reason than it was the only reasonable thing to do once it became apparent that A.C. would be testifying, or, in A.C.'s absence, the People would be able to prove their case.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST